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Before the
Federal Communications Commission
Washington, D.C. 20554

FCC MAIL SECTION

MAR 23 3 02 PM '94

MM Docket No. 94-20

DISP. FILED BY

In re Application of

Family Broadcasting, Inc. File No. BPH-910924MB

For Construction Permit
for a New FM Station on Channel
229A in Hague, New York

HEARING DESIGNATION ORDER

Adopted: March 4, 1994;

Released: March 23, 1994

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Audio Services Division, acting pursuant to delegated authority, has under consideration the above application of Family Broadcasting, Inc. ("Family"), Hague, New York, for a construction permit (File No. BPH-910924MB) for a new FM broadcast station to operate on Channel 229A1 at 93.7 MHz in Hague, New York.

2. *Preliminary matters.* Family lists as holder of 10% of its stock an organization called "Canaan Foundation." Because the Canaan Foundation is a "party" to Family's application under the Commission's attribution rules, see 47 C.F.R. §73.3555 note 2(a), the names of its principals must be supplied. Family has not done so. Accordingly, it will be required to submit that information to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. An engineering study of Family's application, as originally filed, indicates that it proposes to sidemount its antenna on an existing tower used by WANC(FM), Ticonderoga, New York. Our study reveals that Family did not sufficiently address the issue of potential occupational hazards caused by the proposed facilities. Pursuant to OST Bulletin No. 65, October 1985, entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," when persons have access to the site, the transmitter power must be reduced or completely eliminated in order to comply with FCC guidelines. In situations such as Family's, where there are multiple contributors to radiofrequency radiation, all stations are required to reduce power or cease operations as necessary to assure safety with respect to radiofrequency radiation for persons having access to the site. Accordingly, any subsequent grant will be subject to an appropriate condition.

4. Family filed an amendment to its application on January 27, 1992, after the last date for filing amendments as of right. The amendment purported to change the name of the applicant (from "Harvest Broadcasting, Inc. d/b/a Family Broadcasting, Inc." to "Family Broadcasting, Inc."), specify a new transmitter site (with concomitant engineer-

ing changes) and specify a new contact for its certification of site availability. The amendment was unaccompanied by the showing of "good cause" required by 47 C.F.R. §73.3522(a)(6), and therefore the transmitter site and site availability certification portions of the amendment must be returned. However, pursuant to 47 C.F.R. §1.65, that portion of the amendment containing the applicant's name change will be accepted.

5. *Site Availability.* Family certified in question 2, Section VII of FCC Form 301 of the above referenced application that it had reasonable assurance, in good faith, that a site which it designated on the application as the "summit of Mount Defiance, Ticonderoga, N.Y.," would be available for use as an antenna site. Family further certified that such reasonable assurance was not based on its ownership of the proposed site, but had been obtained by contacting Nick Westbrook, (518) 585-2821, identified as the owner's agent. This site is owned by the Fort Ticonderoga Association ("Fort Ticonderoga"). Nicholas Westbrook is the Director of Fort Ticonderoga. On November 14, 1991, Westbrook, on behalf of Fort Ticonderoga, sent a letter to Alexander McEwing, the President of Family, in which he states that he was "disturbed" to read a legal notice posted by Family in "The Times of Ti," a local newspaper, "declaring Family's intention to seek approval from the FCC for an FM broadcast facility based on Mt. Defiance." The letter further states that "neither (McEwing), nor Family Broadcasting, nor any other related entity have approval to do so" from Fort Ticonderoga. Westbrook also refers to a telephone conversation between himself and McEwing which took place in "early September." According to Westbrook, McEwing "inquired about lease possibilities", but Westbrook "stated clearly that we would consider written proposals only, detailing technical and financial implications." The letter concludes by stating that "reasonable assurance of lease of appropriate broadcast facilities on top of Mount Defiance... has not been offered or implied - and will not be."

6. On January 23, 1992, the Commission received a letter from Westbrook in which he indicates that Fort Ticonderoga had "no intention of leasing tower access" to Family and that "there was no basis whatsoever" for Family's representation of reasonable assurance of site availability. Included with this letter was a copy of the above referenced November 14, 1991 letter to McEwing. On May 24, 1993, the Commission sent a letter of inquiry to Joseph E. Dunne, counsel for Family, requesting a response to Westbrook's filing, which will be treated here as an informal objection to Family's application. In the June 1, 1993 response, McEwing asserts that he called Westbrook on September 18, 1993 to "check to see" if the site was available. McEwing further states that Westbrook informed him that Fort Ticonderoga "needed a formal proposal," including the tax status of Family, the rent Family proposed to pay, the time frame in which Family anticipated the station would be built, how much room Family would require in the pre-existing building on the site, and how much electricity the station would use. However, McEwing states that in the September telephone conversation, he also explained to Westbrook that the application process was lengthy and thus the site would not be needed for 18 months to three years, and that Family was "under some time constraints to get the application on file." He further explained that "all the FCC required to allow an applicant to file an application was reasonable assurance that the site would be available," and that "reasonable assurance re-

quired that he had a site available and that he would be willing to rent the site" to Family. McEwing states that he then asked Westbrook whether he had "any objections to (Family) filing an application on the Mt. Defiance site," and Westbrook "expressed no objection, but said that he had a board meeting coming up soon, and that he would like a letter to present to the board." According to McEwing, the entire conversation took "a little over 10 minutes" and was "friendly." McEwing states that it was his belief, following the phone conversation, that Fort Ticonderoga would not object to Family specifying the site in its application, and that he would have to get a formal proposal to Westbrook to "begin the negotiation process." Apparently, the next correspondence McEwing had with Fort Ticonderoga was the November 14 letter.

7. Informal objections must, pursuant to Section 309(e) of the Communications Act of 1934, as amended, provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that the grant of the application would be inconsistent with the public interest. *WWOR-TV, Inc.*, 6 FCC Rcd 193, 197 n.10 (1990). Thus, in the present case, the facts alleged by Fort Ticonderoga must raise a substantial and material question of fact regarding whether or not Family had reasonable assurance that its specified site was available at the time it so certified in the Hague application.

8. Under Commission precedent, reasonable assurance of site availability requires, at a minimum, a meeting of the minds resulting in some firm understanding as to the availability of the site for the intended use. *Genesee Communications, Inc.* 3 FCC Rcd 3595 (Rev. Bd. 1988). A subjective belief by the applicant does not meet the reasonable assurance standard. *Id.* at 1636. Moreover, the fact that a property owner has indicated that he will discuss the possibility of a lease at a future date does not, absent some indication that he is favorably disposed toward making such an arrangement, provide any more assurance than an unrejected offer. *El Camino Broadcasting Corp.*, 12 FCC 2d 25, 26 (Rev. Bd. 1968). While an applicant need not demonstrate absolute assurance, such as a binding contract, a mere possibility that the site will be available is not sufficient. *William F. Wallace and Anne K. Wallace*, 49 FCC 2d 1424 (Rev. Bd. 1974), *Rosemor Broadcasting Co., Inc.*, 45 FCC 2d 920, 29 RR 2d 1113 (Rev. Bd., 1974).

9. In the present case, we are unable to find that Family had reasonable assurance that the Mount Defiance site was available for its use at the time of certification. Whether Family had reasonable assurance that a site was available depends on whose version of the telephone conversation between McEwing and Westbrook one believes. Under Family's account, Westbrook did not actually make an offer to lease the site, but he did not object to Family's designation of the site on its application. Thus, under Family's account, there was not a binding agreement between the parties, but arguably there was more than a mere possibility that the site would be available. Under Fort Ticonderoga's account, there was no meeting of the minds between the parties; Westbrook could consider only written proposals, and therefore there was only an indeterminate chance that Family might obtain a lease for the site sometime in the future. Thus, the totality of the evidence raises sufficient doubt as to whether Family had reasonable assurance of its specified site at the time of certification that a substantial and material question of fact exists on this point

calling for further inquiry. *Columbus Broadcasting Coalition*, 505 F.2d 320, 330 (D.C. Cir. 1974); *Broadcast Enterprise v. FCC*, 310 F.2d 483, 485 (D.C. Cir. 1968).

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the application of Family Broadcasting, Inc. IS DESIGNATED FOR HEARING IN A PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues.

1. To determine, with respect to Family Broadcasting, Inc.:

(a) whether the applicant, at the time it so certified, had reasonable assurance that its proposed site would be available to it;

(b) whether, in light of the evidence adduced pursuant to the foregoing issue, the applicant misrepresented to the Commission the availability of its specified site; and

(c) if issue 1(b) above is resolved in the affirmative, the effect thereof on the applicant's qualifications to be a Commission licensee.

11. IT IS FURTHER ORDERED, That Family shall file an amendment containing the pertinent ownership information regarding the principals of Canaan Foundation with the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That, grant of a permit to Family shall be subject to the following condition:

The permittee/licensee, in coordination with other users of the site, must reduce power or cease operations as necessary to protect persons having access to the site, tower or antenna from radio frequency radiation in excess of FCC guidelines.

13. IT IS FURTHER ORDERED, That the amendment filed on January 27, 1992 IS ACCEPTED in part and IS RETURNED in part.

14. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of the adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the applicant shall, pursuant to Section 1.221 (c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issue specified in

this Order.

16. IT IS FURTHER ORDERED, That the applicant shall, pursuant to Section 311(a) (2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Linda B. Blair, Assistant Chief
Audio Services Division
Mass Media Bureau